MICHAEL ROBAK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 74-211

RAY ALLEN TOLLETT, *Petitioner*

vs.

WILLIAM F. LAMAN, JAMES GIBBONS, ROY PIPPIN AND JIM HARRISON, *Respondents*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI
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Petitioner Ray Allen Tollett respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit in this proceeding, which judgment became final on July 5, 1974.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit and the opinion of the United States District Court for the Eastern Dis-

trict of Arkansas appear in the Appendix. To petitioner's knowledge, neither opinion has been reported at this time.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 3, 1974. It became final on July 5, 1974 when petitioner's timely motion for rehearing was denied. This Petition for Writ of Certiorari is filed within 90 days of June 3, 1974. The Court has jurisdiction under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. WHETHER REVOCATION OF A LICENSE WITHOUT NOTICE TO THE LICENSEE IN VIOLATION OF HIS RIGHTS TO PROCEDURAL DUE PROCESS ESTABLISHES LIABILITY ON THE PART OF ANY OR ALL OF THE MEMBERS OF THE REVOKING BOARD?

II. WHETHER FAILURE OF A MAYOR AND POLICE OFFICER TO COMPLY WITH A COMPULSORY STATE STATUTE IS SUFFICIENT TO ESTABLISH THEIR LIABILITY UNDER 42 U.S.C. 1983?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section I of the Fourteenth Amendment to the Constitution of the United States provides:

> "Nor shall any State deprive any person of life, liberty or property without due process of law . . ."

Title 42 U.S.C., Section 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Ark. Stat. 82-817 provides:

> "The deputies to the Director of State Police shall investigate each fire causing loss of life or damage to property within their jurisdiction to determine if the fire

was caused by negligence or design. If it appears that a fire is of suspicious origin or that a crime has been committed in connection therewith, the deputy shall immediately notify the Director of State Police, who shall promptly initiate an inquiry to ascertain the cause of the fire and the person, if any, responsible therefor. On his own motion and at any time the Director of State Police may investigate the origin and circumstances of any fire in this State without restraint or liability for trespass. Any building or premises may be inspected along with the contents and occupancy thereof. On request every fire insurance company licensed in this State shall furnish to the Director of State Police any information it may have concerning any fire in this State."

STATEMENT OF THE CASE

Ray Allen Tollett during the years 1965 through 1969 owned and operated two businesses within the City of North Little Rock, Arkansas. One business, the A and R Television shop involved the rental, purchase, and repair of television sets. His other business endeavor was the operation of a trailer

park for which he had obtained a permit from the City of North Little Rock, Arkansas. At the time material to this case, the television business was extremely profitable, while the trailer park operation incurred consistant cash-flow losses due to heavy expenditures for capital equipment.

On June 11, 1968, the permit to operate the trailer park was revoked ex parte by the North Little Rock trailer park committee of which Defendant James Harrison was a member. The local newspapers printed an article regarding the revocation, and tenants who had not paid their rent for that month refused to do so because of the revocation. At approximately the same time, electrical service to the park was terminated and meters removed, without notice to the tenants. The tenants began to vacate and creditors proceeded to repossess trailers within several days.

Justification of the revocation involved allegations that the park failed to comply with ordinance regulations governing spacing of trailers, sewage disposal, and drainage. The ordinance in question had been promulgated in the year 1959 and it appeared that the committee entrusted with its enforce-

ment first met when the revocation of Plaintiff's license occurred. There is no history of any other revocation or suspension of a trailer park permit in North Little Rock, and if other meetings of the committee occurred, no formal minutes were made.

The record reflects that several trailers remained on the premises after the revocation; that space rental was paid to one Maurice High, the property owner, and that this continued for several years without any improvements being made in the system of sewage disposal or drainage.

The issues posed for litigation by these series of events are: 1.) whether the procedure employed in the revocation amounted to a denial of a right to property without due process of law and 2.) whether the revocation was a discriminatory or selective application of the ordinance. Evidence was produced by Plaintiff calculated to show that he had received no formal notice of the proposed committee meeting nor any formal notice of its decision. As to the selective enformement, Plaintiff introduced proof that his revocation was the only such revocation, that an unlicensed trailer park continued to operate on the same piece of ground, and that various trailer parks

currently in operation failed to comply with the ordinance.

On February 5, 1969, the A and R Television Shop owned and operated by Plaintiff was destroyed by fire. It is conceded that this fire was of incendiary origin. The complete investigation of this fire by the North Little Rock Police Department took place under the supervision of Defendant Gibbons and is set forth in Defendant's exhibit #1. This fire was never reported by Defendant Gibbons, Defendant Laman or any other city official to the State Fire Marshall or the Director of State Police: No further investigation has occurred since February 7, 1969.

A misconception relied upon by the defendants throughout the course of this law suit involves the assertion that an individual was arrested and charged with having set fire to Plaintiff's television shop. An individual named Pennington was questioned regarding the arson and released by the police. This same person was subsequently accused of grand larceny and the grand larceny charge was dismissed in the municipal court at preliminary hearing.

During the time material to this action, Defend-

ant James Gibbons was head of the Detective Bureau of the North Little Rock Police Department. The Defendant Roy Pippin was the office manager of the North Little Rock Light Department. The Defendant Jim Harrison was a member of the North Little Rock trailer park committee. William F. Laman was the mayor of North Little Rock, Arkansas and had ultimate supervisory authority over the other departments.

REASONS FOR GRANTING THE WRIT

1. The writ of certiorari should issue to review the judgment of the United States Court of Appeals because that judgment has the unique quality of finding that petitioner established a deprivation of procedural due process in connection with a license revocation yet neglects to find liability upon the part of a member of the revoking board.

The action of the trailer park committee in revoking the petitioner's license was unanimous. Petitioner never received notice of the proposed hearing or the decision of the committee. Under these circumstances, petitioner asserts that each member of the board was jointly and severally liable to him for the damage flowing from the deprivation of pro-

cedural due process. Petitioner established a deprivation of due process and further established the defendant Harrison was a member of the trailer park committee and acting under color of law at the time of the revocation. Yet, the Court below has left the petitioner in the curious position of having been wronged and possibly having no individual to compensate him for his damage.

Probably the strongest deterent to actions under 42 U.S.C. §1983 is the lack of governmental liability in many instances for the misconduct of its officers. For the Court to rule that a plaintiff cannot recover from the solvent members of a licensing agency that denies him procedural due process places a new deterent against proceeding under §1983.

2. The judgment below allows state officials to escape §1983 liability even when they failed to comply with a statutory duty imposed by State law. Ark. Stat. 82-817 makes mandatory the requirement that when arson is suspected, immediate notification must be given by the mayor or peace officer to the Director of State Police. Both the Defendant Laman and the Defendant Gibbons failed to make this report.

For the mayor and officer to assert, as in this

case, that each acted in good faith and that the investigation of the arson was completed in good faith simply ignores the real issue involved. Certainly good faith would be important where the decision entrusted to the government official involved an act or decision involving discretion. When the official is required by State law to undertake mandatory action, and fails or refuses to do so, his good faith should be irrelevant.

Petitioner submits that 42 U.S.C. 1983 is a statutory scheme through which the police are policed. To allow state officials to ignore requirements of state law resulting in deprivation of a citizens constitutional rights is to further frustrate the purpose of §1983. Here again the petitioner is wronged yet has no remedy.

One would presume that the reason for requiring the reporting of arson cases to the State police would be to enable those with expertise in investigating arsons to lead the investigation. The officers who wrote reports regarding the arson in question neglected to take any physical exhibits from the scene of the fire. They neglected to take photographs or preserve any evidence. They conducted a fruitless

two-day investigation of a major felony. None of the investigators claimed expertise, and none could claim experience since only one other arson had occurred in the previous decade in North Little Rock.

CONCLUSION

The Writ of Certiorari should be granted to review the judgment of the United States Court of Appeals for the Eighth Circuit. On plenary consideration, that judgment should be reversed and remanded.

Respectfully submitted,

JAMES E. DAVIS
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Attorney for Petitioner

PROOF OF SERVICE

I certify that I have served copies of the foregoing Writ of Certiorari for the Petitioner upon the Attorneys of Record for Defendants by depositing a copy thereof in the United States Mail the 30th day of August, 1974, postage prepaid, in an envelope properly addressed as follows: Mr. Dale Price, 211 Spring Street, Little Rock, Arkansas 72201 and Mr. Sam Hilburn, 115 East Broadway, North Little Rock, Arkansas 72114.

JAMES E. DAVIS

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 73-1649

RAY ALLEN TOLLETT,

Appellant

v.

WILLIAM F. LAMAN, ET AL.,

Appellees

Appeal from the United State District Court for the Eastern District of Arkansas.

Submitted: January 17, 1974

Filed: June 3, 1974

Before MATTHES, Senior Circuit Judge, HEANEY, Circuit Judge, and SMITH, Senior District Judge.*

HEANEY, Circuit Judge.

Ray Allen Tollett filed suit in the United States District Court for the Eastern District of Arkansas against four defendants—William F. Laman, Mayor

of North Little Rock, Arkansas; James Gibbons, Captain of the Detective Bureau of the North Little Rock Police Department; Roy Pippin, Office Manager of the North Little Rock Electric Department; and Jim Harrison, a member of the Sorth Little Rock Board of Investigators.[1] He alleged that the defendants, acting in their official capacities, violated 42 U.S.C. §§1983, 1985(3) and 1986, by conspiring to deprive him of two businesses he operated in North Little Rock. More specifically, he claimed: (1) that the revocation of his trailer park license under City Ordinance No. 2920 by the North Little Rock Board of Investigators on June 12, 1968, deprived him of property without due process of law: (2) that the revocation was a result of selective enforcement which denied him the equal protection of the laws; and (3) that the North Little Rock officials' refusal to make a "proper" investigation of, and their refusal to report a February, 1969, fire which destroyed his television repair shop to the Director of the Arkansas State Police denied him the equal protection of the laws.

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[1]These positions are no longer held by any of the defendants.

*TALBOT SMITH, Senior District Judge, Eastern District of Michigan, sitting by designation.

An additional issue was litigated and decided by the trial court, *see*, FED. R. CIV. P., 15(b): whether the alleged failure of the defendants to give Tollett a notice of intent to terminate electrical services to his trailer park and to provide a hearing with respect to such termination violated Tollett's right to procedural due process.

The District Court, after trial without a jury, entered a judgment dismissing the complaint with prejudice. Tollett appeals from that judgment.

The District Court properly found that neither 42 U.S.C. §1985(3) nor §1986 had been violated because Tollett's proof utterly failed to establish that two or more of the defendants conspired to deprive him of the equal protection of the laws. Each of Tollett's claims, however, is also cognizable under §1983, and conspiracy is not an indispensable element under that section. The District Court, therefore, properly considered Tollett's claims under that section.

In considering Tollett's claims under §1983, it is clear from the record that:

(1) the claims based on the failure to properly investigate and report the fire involve only Laman and Gibbons;

(2) the claim based on the termination of electrical service involves only Pippin; and

(3) the claims based on the revocation of the trailer park license and selective enforcement of the ordinance under which the license was revoked involve only Harrison.

It follows that dismissal as to each claim was proper as to the defendants not involved. We are left with the question, however, of whether the court erred in rendering judgment in favor of the defendants who were involved in the dismissed claims.

The trial court properly dismissed the fire claims as to Laman and Gibbons. Its findings that the investigation was undertaken in good faith and carried on honestly is supported by the record. Furthermore, Tollett's contention that the failure to report the fire constituted a denial of equal protection is without merit.

The trial court properly dismissed the claim against Pippin based on termination of electrical services. The service regulations filed with the Public Service Commission of Arkansas permit the North Little Rock Electric Department to cancel a customer's service upon giving a customer notification that

unless the balance due on his bill is paid within three days, a disconnection will be made. No attack on the validity of this regulation has been made, and we decline to reach the question *sua sponte*. Moreover, it is clear from the record that independent of the regulation, there was no violation of procedural due process. The plaintiff was three months delinquent in the payment of his bills; he had been notified that his power would be cut off unless he paid them; he discussed the patter with a company official and then failed to make payment.[2]

The trial court properly dismissed Tollett's claim of selective and discriminatory enforcement of City Ordinance No. 2920. While the record reveals that no other revocations have occurred in North Little Rock and that other trailer parks were at various times not in compliance with parts of the ordinance, it does not indicate that there was intentional or purposeful discrimination. Such a showing is generally

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[2]A number of the Courts of Appeals have recently outlined varying procedural due process requirements with which public utilities must comply prior to terminating service to customers. *See, e.g., Jackson v. Metropolitan Edison Company*, 483 F.2d 754 (3rd Cir. 1973); *Palmer v. Columbia Gas of Ohio, Inc.*, 379 F.2d 153 (6th Cir. 1973); *Lucas v. Wisconsin Electric Power Company*, 466 F.2d 638 (7th Cir. 1972) (En Banc), *cert. denied*, 409 U.S. 1114 (1973).

required to establish a claim of selective enforcement of a law. *See, Snowden v. Hughes*, 321 U.S. 1 (1944); K. DAVIS, DISCRETIONARY JUSTICE, A PRELIMINARY INQUIRY 1962 (1970); Comment, 61 COLUM. L. REV. 1103, 1113 (1961).

The question of whether Tollett's claim against Harrison for voting to revoke his trailer park license was properly dismissed remains.[3]. The trial court dismissed the claim on the grounds that the chairman of the Board of nvestigators advised plaintiff in writing on June 12, 1968, that his license had been revoked for the following reasons:

> * * * (1) the poor condition of the sewer system; (2) noncompliance with fire prevention and protection regulations dealing with the spacing of trailers; and (3) the poor condition of the road in the trailer park. Petitioner was advised that the trailers must be moved if no corrective action was taken within 30 days.

The finding that Tollett was notified of the revocation cannot be sustained. Tollett denied receiving the June 12th letter from the Board of Investigators

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[3]It is implicit from the District Courts action in proceeding to the merits of this claim, that it was of the view that notice and an opportunity for a hearing before revocation of Tollett's license became finally effective was required to conform with the demands of procedural due process. We agree. *See. Bell v. Burson*, 402 U.S. 545 (1971).

notifying him that his license had been revoked pursuant to Section 13[4] of City Ordinance No. 2920, and informing him of his rights to a hearing and court review pursuant to Sections 14 and 15[5] of the ordinance."

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[4] SECTION 13. *Revocation and Suspension.* (a) The Board of Investigators is hereby authorized to revoke any license issued pursuant to the terms of this ordinance if after due investigation they determine that the holder thereof has violated any of the provisions of this ordinance or that any trailer, trailer camp, or tourist camp is being maintained in an unsanitary or unsafe manner or is a nuisance.

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[5] SECTION 14. *Hearing on Granting, Denial, Rentwal, or Revocation of License.* Any person aggrieved by an order of the Board of Investigators granting, denying, renewing or revoking a license for a trailer camp or tourist camp, under this ordinance, may file a written request for a hearing before the Board within ten (10) days after issuance of such order. The Board shall give notice of a public hearing upon this request to be held in not less than five (5) days after service of the notice on the person requesting the hearing. The Board may also give notice of the hearing to other persons directly interested in the order in question. At such hearing, the Board shall determine whether the granting, denial, renewal, or revocation of the license was in accordance with the provisions of this ordinance and shall issue a written findings of fact, conclusions of law and an order to carry out its findings and conclusions. These findings of fact, conclusions of law, and order shall be filed with the Secretary of the Board and served by the Board upon all parties appearing or represented at said hearing.

SECTION 15. *Court Review.* Any order either granting, denying, renewing, or revoking any license under the pro-

The only testimony offered by the defendants to establish that Tollett had been notified was that of Harrison. He testified that the Board of Investigators *wrote* Tollett a letter on June 12, 1968, revoking the license. A copy of that letter, signed by James Murray, Chairman of the Board of Investigators, was received in evidence. The testimony and the exhibit were insufficient to establish that the notice was mailed let alone received by Tollett. *See, Leasing Associates, Inc. v. Slaughter Associates, Inc.*, 450 F.2d 174 (8th Cir. 1971).

Tollett, thus, established that his trailer park license was revoked without notice and in violation of his rights to procedural due process. This finding,

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visions of this ordinance may be appealed to the Circuit Court in the same manner as appeals from any order under the building or zoning ordinances of the City of North Little Rock. Appeals from such orders must be taken within ten (10) days after the order is issued. Upon any such appeal the findings of fact of the Board of Investigators, if supported by substantial evidence, shall be conclusive.

[6]Although the ordinance provides for a hearing only after a license has been revoked, Tollett did not challenge the constitutionality of the ordinance. On the facts of this case where the revocation did not become effective until thirty days after notice was supposed to have been given and an opportunity for a hearing prior to the expiration of this period was available, we believe that procedural due process requirements would have been complied with had notice to Tollett actually been given. *See, Bell v. Burson, supra.*

alone, however, does not permit us to conclude that Tollett is entitled to recover damages from Harrison. Three questions must be answered before that conclusion can be reached: (1) Was Harrison responsible for the failure of the Board of Investigators to notify Tollett that his trailer park license had been revoked; (2) if he was responsible, is the defense of good faith available to him; and (3) if he was responsible and if the defense of good faith is not available to him, what damages, if any, did Tollett suffer as a result of the failure to notify him that his trailer park license had been revoked. We remand to the District Court with instructions to it to take such additional testimony, if any, that it feels is necessary for it to answer these questions and to make its final decision with respect to whether Harrison is liable to Tollett for violating his constitutional rights and, if so, the extent to which Tollett has been damaged.

Tollett's request for attorney's fees is denied. Each party will bear his own costs of appeal.

Affirmed in part, reversed in part and remanded to the District Court for action consistent with this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

NO. LR-72-C-40

RAY ALLEN TOLLETT,
Appellant

vs.

WILLIAM F. LAMAN, ET AL.,
Appellees

MEMORANDUM OPINION

This cause has been tried to the Court without a jury and submitted on the pleadings, oral testimony, documentary evidence, and memorandum briefs. This memorandum incorporates the Court's findings of fact and conclusions of law.

Plaintiff, Ray Allen Tollett, is a citizen of the United States and presently resides in the City of Nashville, Arkansas. In 1968 and 1969, the period with which the Court is concerned, plaintiff was a resident of the City of North Little Rock, Arkansas,

where he was operating a trailer court and a television repair shop.

During that period of time the defendant William F. Laman was Mayor of North Little Rock, the defendant James Gibbons was head of the Detective Bureau of the North Little Rock Police Department, the defendant Roy Pippin was the office manager of the North Little Rock Light Department, and the defendant Jim Harrison was a member of the Board of Investigators established by section 2 of North Little Rock Ordinance No. 2960 adopted in July 1959 and regulating the operation of trailer parks in North Little Rock.

The suit arises out of the fact that in 1968 plaintiff's license to operate his trailer park was revoked by the Board of Investigators, sometimes referred to as the Trailer Park Committee, and out of the further fact that in 1969 plaintiff's television repair shop was destroyed by a fire of apparently arsonous origin.

The suit was filed on February 7, 1972, and federal jurisdiction is predicated upon 28 U.S.C.A., sections 1331 and 1343, and 42 U.S.C.A., sections 1983, 1985, and 1986. The complaint alleges in sub-

stance that the defendants, acting in their official capacities, conspired together to destroy plaintiff's businesses and force him to leave North Little Rock. It is further alleged that the revocation of plaintiff's license to operate his trailer park amounted to a deprivation of property without due process of law and to a denial of the equal protection of the laws. As to the fire, it is alleged that City officials refused to make a proper investigation of the fire, and that their refusal was part of the alleged scheme to force plaintiff to leave North Little Rock. Plaintiff seeks to hold the defendants liable to him jointly and severally in the sum of $200,000.

The defendants deny that plaintiff is entitled to any relief against any of them either singly or collectively, and the Court agrees with them.

It is unquestionably true that during the period in question plaintiff was having some difficulties with municipal authorities in North Little Rock in connection with his trailer park and perhaps in other connections as well. Assuming that plaintiff honestly believes that the defendants in fact conspired to ruin his business and "run him out of town," there is absolutely no substantial evidence to that effect.

As far as the trailer park is concerned, the Court finds that as early as April 1968 plaintiff has been advised by the North Little Rock Sewer Department that the sewage facilities at his trailer park were inadequate. The Court further finds that on June 12, 1968, the Chairman of the Board of Investigators that has been mentioned advised plaintiff in writing that his license had been revoked for the following reasons: (1) the poor condition of the sewer system; (2) noncompliance with fire prevention and protection regulations dealing with the spacing of trailers; and (3) the poor condition of the road in the trailer park. Petitioner was advised that the trailers must be moved if no corrective action was taken within 30 days.

That action appears to have been taken by the Board ex parte, but plaintiff was advised in the notice of revocation of his right to a hearing before the Board and to judicial review of the Board's action as provided by section 14 and 15 of the ordinance. Plaintiff never sought either a hearing before the Board or any appropriate judicial review of the Board's determination.

This Court of course does not review directly the merits of the action taken by the Board. For pur-

poses of this lawsuit the Court does not find that the Board's action was arbitrary, capricious or discriminatory. More than that, there is no evidence here that Mayor Laman or Mr. Gibbons or Mr. Pippin had anything whatever to do with the revocation. Plaintiff argues that his license was the only one that has ever been revoked in North Little Rock. That may or may not be true, but assuming that it is, that fact standing alone is not sufficient to establish that the revocation of plaintiff's license was discriminatory.

Plaintiff argues that not only was his license revoked but also that electrical service to his trailer park was cut off without notice. On that point the evidence shows that the power was cut off because plaintiff owed the City a substantial bill for electrical service which he failed or refused to pay, and that, indeed, the bill has never been paid.

As to the investigation of the fire, the Court finds that the fire was investigated by the North Little Rock Police Department; that a suspect was arrested and charged, and that the Municipal Court of North Little Rock dismissed the charge on account of insufficiency of evidence. There is no evidence that the investigation was not undertaken in good faith or that it was not carried out honestly.

In his brief counsel for plaintiff charges that Mayor Laman and Mr. Gibbons did not perform certain duties said to have been imposed upon them by certain sections of the Arkansas Fire Prevention Act, Act 254 of 1955, which sections are now codified as Ark. Stats., Ann., sections 82-809, 82-810, 82-817, and 82-818. Assuming arguendo that the Mayor or Mr. Gibbons should have reported the fire to the Director of Arkansas State Police, and that the fire was not so reported, the Court does not find that their failure, if any, to report the fire was part of any conspiracy or plan to injure plaintiff, or that it did injure him in any way. As has been seen, the fire was investigated, and an arrest was made.

A judgment dismissing the complaint with prejudice will be entered.

Dated this 24th day of May, 1973.

(S) J. SMITH HENLEY
United States District Judge

SUPREME COURT, U. S.
FILED
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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-211

Ray Allen Tollett, *Petitioner*

vs.

William F. Laman, James Gibbons, Roy Pippin and Jim Harrison, *Respondents*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

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Ray Allen Tollett, *Petitioner*

vs.

William F. Laman, James Gibbons, Roy Pippin and Jim Harrison, *Respondents*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondents, William F. Laman, James Gibbons, Roy Pippin and Jim Harrison, respectfully pray that Petitioner's petition for a Writ of Certiorari be denied.

QUESTIONS PRESENTED

I.

WHETHER REVOCATION OF A LICENSE WITHOUT NOTICE TO THE LICENSEE IN VIOLATION OF HIS RIGHTS TO PROCEDURAL DUE PROCESS ESTABLISHES LIABILITY ON THE PART

OF ANY OR ALL OF THE MEMBERS OF THE REVOKING BOARD?

II.

WHETHER FAILURE OF A MAYOR AND POLICE OFFICER TO COMPLY WITH A COMPULSORY STATE STATUTE IS SUFFICIENT TO ESTABLISH THEIR LIABILITY UNDER 42 U.S.C. §1983?

I.

WHETHER REVOCATION OF A LICENSE WITHOUT NOTICE TO THE LICENSEE IN VIOLATION OF HIS RIGHTS TO PROCEDURAL DUE PROCESS ESTABLISHES LIABILITY ON THE PART OF ANY OR ALL OF THE MEMBERS OF THE REVOKING BOARD?

It is the position of Respondent Harrison that this question was not raised by the opinion of the United States Court of Appeals for the Eighth Circuit. That opinion reversed the finding by the District Court that the Petitioner was notified of the license revocation and then the Court of Appeals also found that Petitioner had in fact established at the trial that his trailer park license was revoked without the necessary post revocation notice which was in violation of his rights to procedural due process. The Court of Appeals concluded that that fact alone was not sufficient to justify a finding that Petitioner was entitled to recover damages from Respondent Harrison. It is with this last conclusion that Petitioner takes issue and that Respondent Harrison asserts is a proper holding based upon a general rule recognized by several of the Courts of Appeal none of which has rendered

a decision in conflict therewith and which is not in conflict with any applicable decisions of this Court. *Roberts v. Williams*, 456 F.2d, 819 (5th Cir. 1972), *Brown v. United States*, 486 F.2d 284 (8th Cir. 1973), and *Dunham v. Crosby*, 435 F. 2d 1177 (1st Cir. 1970). The Court of Appeals remanded this part of the case to the District Court with instructions to take the necessary steps to answer three questions concerning Respondent Harrison's role in the deprivation of Petitioner's procedural due process rights. In this fact situation, the revocation of the license itself was not the action which constituted the deprivation of procedural due process; but rather the failure to provide post revocation notice was the nonfeasance which the Court of Appeals found to be the basis for this action under 42 U.S.C. §1983. The Court of Appeals found that the record was bare as to any evidence concerning the procedures under which the Trailer Park Committee operated and consequently it was not possible to establish that Respondent Harrison was responsible for the Committee's failure to provide post revocation notice. "That statute [42 U.S.C. §1983] contemplates only the liability of persons who have personally directed or participated in the deprivation of federal rights." *Campbell v. Anderson*, 335 F. Supp 483 (1971). This rationale is widely recognized and has been stated in *Richardson v. Snow*, 340 F. Supp. 1261 (1971) as follows:

> As a general rule an official will not be liable in an action brought under the Civil Rights Act 42 U.S.C. §1983 unless he directly and personally participates in conduct under color of state law which deprives the plaintiff of rights, privileges, and immunities secured him by the Federal Constitution.

Petitioner argues that the Court of Appeals erred as a matter of law in remanding this case for additional

evidence when in fact the Court of Appeals simply held that although an action by the Committee was violative of Petitioner's right to procedural due process, the evidence in the record was insufficient to establish the liability of a single committee member for that action. This decision is not yet ripe for review in as much the Court of Appeals has extended the opportunity to both parties to enlarge the record in order to enable the District Court to render its decision in accordance with applicable law. The Petitioner has suffered no injury as a result of the decision of the Court of Appeals in that it is not a final determination of the merits of this case and Petitioner has an opportunity to prevail in his cause of action.

II.

WHETHER FAILURE OF A MAYOR AND POLICE OFFICER TO COMPLY WITH A COMPULSORY STATE STATUTE IS SUFFICIENT TO ESTABLISH THEIR LIABILITY UNDER 42 U.S.C. §1983?

There are many good reasons why this Honorable Court should deny certiorari in the case at bar. First, this Court's own holdings in recent years support the legal defense of good faith in a §1983 action. Secondly, even were these holdings not controlling, the circumstances in the case at bar do not present a proper case in which to abolish the defense of good faith in these 42 U.S.C. §1983 actions. Finally, the circumstances in the case at bar indicate no causal connection between the failure of the mayor and the chief of police to report the fire and any injury which may have resulted to the plaintiff.

The petitioner asserts that when city officials, here a mayor and a chief of police, have not complied with a

"mandatory" state law, the good faith of the officials is irrelevant to their liability for damages under 42 U.S.C. §1983. We cannot agree. The qualified immunity of city officials demands that the plaintiff prove that the defendants did not act in good faith in the performance of their respective duties. *Nelson v. Knox*, 256 F.2d 312 (6th Cir. 1958); *Huey v. Barloga*, 277 F. Supp. 864 (N.D. Ill. 1967). Proof of ordinary negligence is not enough. *Jenkins v. Averett*, 424 F. 2d 1228 (4th Cir. 1970).

We respectfully submit that this Honorable Court in a series of recent decisions has recognized this principle. In 1961 in the case of *Monroe v. Pape*, 365 U.S. 167 (1961), this court indicated that the Civil Rights Acts should be read against the general background of tort liability. And later, in *Pierson v. Ray*, 386 U.S. 547 (1967), the defense of good faith and probable cause was held available to police officers in an action for damages under 42 U.S.C. §1983:

> "We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under §1983."

Furthermore, that the executive branch of government enjoys a qualified immunity which justifies a good faith defense has been reaffirmed recently:

> "These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of Government, the variation dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for

> the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Scheuer v. Rhodes*, 94 S. Ct. 1683 (1974).

We respectfully submit that this question of law is not a novel question; rather one in which this court has in the past provided sufficient guidance.

Even were this court to decide that more guidance for the lower federal courts was needed, the case at bar is not the proper case in which to present this issue.

The findings of the District Court, the Honorable J. Smith Henley presiding, are clear:

> "As to the investigation of the fire, the Court finds that the fire was investigated by the North Little Rock Police Department; that a suspect was arrested and charged, and that the Municipal Court of North Little Rock dismissed the charge on account of insufficiency of evidence. There is no evidence that the investigation was not undertaken in good faith or that it was not carried out honestly." *14a, Appendix, Appellant's Brief.*

Furthermore, the Circuit Court of Appeals affirmed that part of the opinion:

> "The trial court properly dismissed the fire claims as to Laman and Gibbons. Its findings that the investigation was undertaken in good faith and carried on honestly is supported by the record. Furthermore, Tollett's contention that the failure to report the fire constituted a denial of equal protection is without merit." *4a, Appendix, Appellant's Brief.*

More importantly, it seems the plaintiff was not prejudiced by the failure of Mayor Laman and Chief Gibbons to report the fire in question.

"Assuming arguendo that the Mayor or Mr. Gibbons should have reported the fire to the Director of Arkansas State Police, and that the fire was not so reported, the Court does not find that their failure, if any, to report the fire was part of any conspiracy or plan to injure plaintiff, or that it did injure him in any way. As has been seen, the fire was investigated, and an arrest was made." *15a, Appendix, Appellant's Brief.*

The petitioner has not indicated any conflict of this circuit court opinion with any other Circuit Court of Appeals decision. Nor has he presented an issue in conflict with any prior decisions of this Honorable Court. Rather, he asserts only that this is an important question of federal law which should be settled by this court.

We respectfully submit that this Court has settled this important issue, and in a manner which the District Court and Circuit Court of Appeals followed.

CONCLUSION

The Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served a copy of the foregoing Response to Petition for Writ of Certiorari upon the Attorney of Record for Petitioner by depositing a copy thereof in the United States Mail the 30th day of November, 1974, postage prepaid, in an envelope properly addressed as follows: Mr. James E. Davis, 711 Pecan Street, Texarkana, Arkansas 75501.

DALE PRICE
and
SAM HILBURN